Supreme Court, U.S.
FILED

97-87 MAY 28 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DISTRIBUTEL, INC.

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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28th day of May, 1997

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THE SUPREME COURT OF THE
STATE OF ALASKA

DISTRIBUTEL, INC.
Appellant,

v.

STATE OF ALASKA,
Appellee.

No. S-7157

OPINION
[No. 4458 - January 3, 1997]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Reese, Judge.

Appearances: Carl J.D. Bauman, Hughes, Thorsness, Gantz, Powell & Brundin, LLC, Anchorage, for Appellant. Daveed A. Schwartz, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Compton, Chief Justice, Rabinowitz, Matthews, Eastaugh, and Fabe, Justices.

MATTHEWS, Justice.

Distributel, Inc., sells advertising products imprinted with the name of businesses or political candidates. It makes numerous sales by calling potential or former customers over the telephone.

This case was initiated when the State filed a complaint charging that Distributel had made telephone sales in Alaska without registering as a telephonic seller under AS 45.63.010,[1] a provision of the Telephonic

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[1] AS 45.63.010 provides:

> (a) A person may not sell or atternpt to sell property or services by telephonic means if the person makes substantially the same offer on substantially the same terms to two or more persons, unless the telephonic seller is registered with the Department of Law at least 30 days before the solicitation campaign.
>
> (b) To register under (a) of this section, a person shall file with the department
>
> (1) a notice of intent to engage in a solicitation campaign; a separate notice of intent shall be filed for each solicitation campaign;
>
> (2) an irrevocable consent appointing the department the person's agent for the receipt of service of process in a court action or other proceeding against the person, or the successor in interest of the person, for a violation of this chapter; and
>
> (3) a signed statement that the person has read and will comply with this chapter and the regulations adopted under this chapter.

Solicitation Act (the Act). After a temporary restraining order and preliminary injunction were issued, the parties stipulated to the entry of a permanent injunction which enjoined Distributel from selling by telephone in Alaska without first registering in accordance with the terms of the Act. The injunction also provided that permission of the court would be required for Distributel to operate in Alaska through the "mail order sales" exemption expressed in AS 45.63.080(14).[2] Finally, the injunction provided that "all issues in the above-titled litigation are hereby resolved."

(c) Registration under (b) of this section is not complete until the telephonic seller receives an acknowledgement from the department that the seller has complied with (b) of this section.

(d) The notice of intent must be on a form provided and established by the department by regulation. The notice of intent must include detailed information about the nature of the solicitation campaign and the identity and business practices of the telephonic seller, including information on the employees, agents, and officers affiliated with the telephonic seller. The notice of intent must disclose criminal convictions, civil judgments, orders, consent decrees, or administrative determinations involving allegations of unfair or deceptive business practices by the telephonic seller.

(e) A person may not provide false information in a notice of intent.

2 AS 4563.080(14) provides:

This chapter does not apply to a sale attempted sale

Distributel then filed a motion seeking permission to "operate as a mail order telephonic seller under the 'catalog exemption' of AS 45.63.080(14)." The State opposed this motion. In response, the superior court entered an order which provided, in part, that Distributel could not initiate calls to Alaska customers under the catalog exemption. Instead, Distributel was limited to receiving calls from customers responding to Distributel's catalog.

Distributel appeals from this order, claiming that the court erred in interpreting the mail order catalog exemption and, alternatively, that the application of the statute to Distributel is unconstitutional. We affirm the superior court's order.

"[A] sale or attempted sale . . . of property from a mail order catalog that is published on a regular, periodic basis, and that describes or pictures the items for sale and prominently provides the specific price of each item" is exempt from the registration requirement of the Act. 45 45.63.080(14). The superior court interpreted this exemption as not encompassing sales initiated by a telephone call from a seller following the seller's delivery of a mail order catalog to consumers. In our view, this is a reasonable interpretation of the statutory phrase "sale . . . from a mail order catalog." The superior court's interpretation tracks the normal course of mail order catalog sales. It also comports with the manifest purpose of the Act, which is to prevent unregistered telephone marketers from making unsolicited sales calls over the telephone.

. . .

(14) of property from a mail order catalog that is published on a regular, periodic basis and that describes or pictures the items for sale and prominently provides the specific price of each item[.]

Moreover, it is consistent with the mail order catalog exclusion in a federal act having a similar purpose.[3] Finally, this interpretation is consonant with the legislative history of the Act.[4]

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[3] The Federal Trade Commission has excluded from the definition of "telemarketing" under the federal Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101-08, the

> solicitation of sales through the mailing of a catalog which: Contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls only takes orders without further solicitation.

16 CFR 310.2(u) (1996) (emphasis added).

[4] The Assistant Attorney General who was credited by the sponsor of the Act as having worked extensively to develop it, testified before a Senate committee that "the bill would not apply to transactions where the customer initiates the telephone call, provided that it is not in response to a specific request that the customer initiate the call."

Distributel argues that the superior court's order governing mail order catalog sales violates numerous state and federal constitutionally guaranteed rights. This argument has been waived. Each of the constitutional questions posed by Distributel was placed in issue by it in its answer to the original complaint. They were resolved by the stipulated permanent injunction. See Singh v. State Farm Mut. Auto. Ins. Co., 860 P.2d 1193, 1197 (Alaska 1993) (citing Harold's Trucking v Kelsey, 584 P.2d 1128, 1129-30 & n.3 (Alaska 1978)).[5]

The order of the superior court is AFFIRMED.

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[5] Distributel makes several other arguments. They are without merit and need not be addressed.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-94-7353 Civil

STATE OF ALASKA,
Plaintiff,

v.

DISTRIBUTEL, INC.
Defendant.

STIPULATION AND ORDER FOR ENTRY OF PERMANENT INJUNCTION AND FINAL JUDGMENT

IT IS HEREBY STIPULATED by and between counsel for the parties to this action, and ORDERED pursuant to AS 45.50.501(a) and for the reasons stated in the court's October 11, 1994 Preliminary Injunction, that:

(1) The above named defendant, its officers, agents, servants, employees, attorneys and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby permanently enjoined from selling or attempting to sell property or services by telephonic means to Alaska without first registering as a telephonic seller with the Alaska Department of Law according to the requirements of AS 45.63.010(a) – (e);

(2) Furthermore, unless the defendant secures the written approval of the Attorney General's Office, if defendant intends to operate in Alaska through the "mail ordered sales" exemption at AS 45.63.080(14), prior permission of this court is required;

(3) Within ninety (90) days of the date of this Stipulation and Order, defendant shall pay Costs and Attorney's Fees to plaintiff State of Alaska in the amount of ten thousand dollars ($10,000.00). Failure to pay this amount within ninety (90) days of the date of this Stipulation and Order shall constitute grounds for rejection or revocation of any telephonic seller registration by defendant pursuant to AS 45.63.010; and

(4) By this Stipulation and Order, all issues in the above titled litigation are hereby resolved. Proceedings in "Case No. 3AN-94-7353 Civil," (i.e., the above titled case), are terminated and the case shall be closed; except that:

(a) the Superior Court for the Third Judicial District of Alaska shall retain continuing jurisdiction over this case, and

(b) the Attorney General may petition the court to re-open this case for further proceedings upon a showing of non-compliance with any of the terms of this Stipulation and Order, including

contempt of court proceedings and proceedings under AS 45.50.551(a).

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN
Attorneys for Distributel, Inc.

Dated: March 8, 1995 By: /s/ Clyde E. Sniffen, Jr.
Clyde E. Sniffen, Jr.

BRUCE M. BOTELHO
ATTORNEY GENERAL
STATE OF ALASKA

Dated: March 8, 1995 By: /s/ Daveed A. Schwartz.
Daveed A. Schwartz
Assistant Attorney General

ORDER

IT IS SO ORDERED this 9th day of March, 1995.

/s/ John Reese
JOHN REESE
SUPERIOR COURT JUDGE

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

DISTRIBUTEL, INC.,

Defendant.

No. 3AN-94-7353 Civil

ORDER GOVERNING MAIL ORDER CATALOG SALES

Having considered defendant's March 22, 1995 "Request for Approval to Conduct Telephonic Sales Activity Under AS 45.61.080(14)," and having considered the State's opposition thereto, IT IS NOW THEREFORE ORDERED, pursuant to paragraph 2 of the court's March 9, 1995 "Stipulation and Order for Entry of Permanent Injunction and Final Judgment," that:

1. Defendant's 1995 catalog, entitled *The DistribuTec Line*, along with the inserts attached to defendant's March 22, 1995 "Request for Approval to Conduct Telephonic Sales Activity Under AS 45.63.080(14)," does not qualify as a "mail order catalog" under the provisions of AS 45.63.080(14)" Defendant's March 22, 1995 "Request for Approval to Conduct Telephonic Sales Activity Under AS 45.63.080(14)" is hereby denied.

2. In order to satisfy AS 45.63.080(14), defendant's mail order catalog(s) must include, as part of the mail order catalog itself, defendant's business name (i.e., "Distributel, Inc."), mailing address, telephone number,

and product ordering instructions to enable Alaska consumers to place a product order by mail or by phone. Defendant must submit to the Attorney General's Office a copy of each and every type of mail order catalog(s) it intends to use in Alaska, sufficiently in advance of the actual mailing of such mail order catalog(s) to Alaska consumers, to allow the State in its discretion to make timely objections to the court.

3. In making sales of property from a mail order catalog approved either by the State or by this court, defendant may not engage in so-called "lead generation" sales calls to Alaska consumers, (i.e., sales calls initiated by a telephonic seller to consumers, following the telephonic seller's delivery of a mail order catalog to those consumers), and may not otherwise solicit "mail order catalog" customers in Alaska by telephonic means. Instead, defendant may only receive calls initiated by "mail order catalog" Alaska customers in response to one or more of defendant's "mail order catalogs," and that during those calls defendant may only provide the customer with information about, and attempt to sell items included in the same "mail order catalog(s)" which prompted the customer's call.

4. If Defendant secures the approval of the State or the court to operate in Alaska through the "mail order sales" exemption at AS 45.63.080(14), the defendant must publish its mail order catalog(s) to Alaska consumers "on a regular, periodic basis" in order to continue to operate in Alaska through the "mail order sales" exemption. Defendant has thus far failed to publish a qualified mail order catalog "on a regular, periodic basis" to or in Alaska.

5. Approval to operate in Alaska through the "mail order sales" exemption shall only apply to defendant on a sale-by-sale, and attempted-sale -by-sale, basis. The mail order catalog exemption at AS 45.63.080(14) does not offer a blanket exemption for all sales and attempted sales by defendant merely because some of defendants sales or

attempted sales might be of property from a mail order catalog. The mail order catalog exemption mandates that a case-by-case determinatinbe made as to whether any given sale or attempted sale is of property from a mail order catalog. Only sales or attempted sales made in compliance with paragraph 3 above will be considered to be sales or attempted sales of property from a mail order catalog. Sales or attempted sales that are not of property from a mail order catalog are subject to the requirements of AS 45.63 if made by telephonic means. Accordingly, the court's permanent injunction shall remain intact indefinitely, despite possible approval by the State or the court of any future request by defendant to operate in Alaska through the "mail order sales" exemption.

6. It is the court's intention in entering this Order that Distributel may send out mail order catalogs approved by either the State or the court, and then await calls initiated by Distributel's mail order catalog customers. Distributel is prohibited from making any so-called "lead generation" sales calls in connection with "mail order catalog" sales to Alaska. Distributel may not initiate sales calls to any Alaska consumers without first registering as a telephonic seller in full and complete compliance with AS 45.63.010(a)–(e).

ENTERED at Anchorage, Alaska this 28th day of April, 1995.

/s/ John Reese

JOHN REESE
SUPERIOR COURT JUDGE